86 - 1360

No. 86 ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

CONSTELLATION LINES, S.A. and
ENTERMAR SHIPPING CO. S.A.,

Petitioners,

—against—

GEORGE KARVELIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. WALSH
Counsel for Petitioners
80 Pine Street
New York, New York 10005
(212) 425-1900

FREEHILL, HOGAN & MAHAR
80 Pine Street
New York, New York 10005

Of Counsel

QUESTIONS PRESENTED

Should United States law apply to a Greek seaman's injury aboard a Greek flag ship beneficially owned and controlled by Greek citizens and residents, when a Greek court holds that Greek law should apply?

Is a foreign defendant denied due process of law when United States law is applied to a controversy with a foreign plaintiff, merely because the foreign defendant does business here?

PARTIES

All parties to the proceeding below are named in the caption, except that Constellation Lines, Inc. and Constellation Navigation, Inc. were dismissed by the District Court. Petitioners are privately owned corporations.

CONTENTS

Authorities

Cases PAGE

Text

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

No. 86 ____

CONSTELLATION LINES, S.A. and
ENTERMAR SHIPPING CO. S.A.,

Petitioners,

—against—

GEORGE KARVELIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (1a), *infra* is reported at 806 F.2d 49. The opinion of the United States District Court for the Southern District of New York (14a) *infra* is reported at 608 F.Supp. 966.

Jurisdiction

The judgment of the United States District Court for the Southern District of New York (26a) was entered on May 1, 1986 and an appeal was timely taken to the United States Court of Appeals for the Second Circuit on May 29, 1986.

The decision of the United States Court of Appeals for the Second Circuit (1a) affirming the judgment of the District Court was entered on November 21, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.

AMENDMENT V, UNITED STATES CONSTITUTION

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

AMENDMENT XIV, UNITED STATES CONSTITUTION

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. 688

STATEMENT

On March 24, 1984 Second Mate George Karvelis, who was born in Greece and was a citizen and resident of Greece, sustained an injury aboard the CONSTELLATION ENTERPRISE, a Greek flag ship owned by the Panamanian Petitioner, Entermar Shipping Co. S.A.* and operated by the Greek Petitioner Constellation Lines, S.A. All of the shares of Petitioners Entermar and Constellation were owned by three Greek citizens, who also reside in Greece. (15a)

Under the Greek Collective Bargaining Agreement, Karvelis was entitled to medical care and sick wages. Under the Greek Workmen's Compensation law he would have been entitled to a permanent partial disability award. Nonetheless, Karvelis, claiming status as a Jones Act seaman, commenced suit against Petitioners in the United States District Court, Southern District of New York.

Shortly thereafter, Petitioners commenced an action against Karvelis in the Court of First Instance of Piraeus, Greece seeking a declaration that Petitioners were not liable for general damages (as distinguished from workmen's compensation type liability). (28a). In the interim, District Judge Carter enjoined Petitioners from proceeding against Respondent in Greece pending his decision on Petitioners' Motion to Dismiss for lack of jurisdiction and on the grounds of *forum non conveniens*. (25a).

Although recognizing that none of the beneficial shipowners is a United States citizen or resident and that Respondent was a Greek resident aboard a Greek flag ship controlled by Greek residents, the District Court denied Petitioners' Motions to Dismiss and held that United States law, including the Jones Act, 46 U.S.C. § 688, should apply, as Petitioners' presence in the United States made it unfair to withhold Jones Act obligations from Petitioners. (14a).

---

* Mistakenly referred to as Entemar in the proceedings below.

On April 30, 1986, after a four day jury trial, the District Court entered a judgment in favor of Respondent in the amount of $300,000. (26a). On May 12, 1986, the Court of the First Instance of Piraeus rendered its decision holding that Petitioners were not at fault in the matter and had no civil liability to Respondent. (28a).

The District Court judgment was appealed to the United States Court of Appeals for the Second Circuit which affirmed, adopting the opinion of the District Court. (1a).

The jurisdiction of the federal court below was based on the Jones Act, 46 U.S.C. § 688 and admiralty and maritime jurisdiction 28 U.S.C. § 1333.

REASONS FOR GRANTING WRIT

When application of United States law causes a judgment of a United States Court to be in direct conflict with the judgment of a foreign court, it is urgent for this Court to consider whether United States conflict of law analysis should be brought into line with the conflict of law jurisprudence of other countries.

The Greek Court in Decision No. 766/1986 (28a) applied traditional conflict of laws values. See *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Restatement of the Law, Conflicts of Law* § 377 (1934). The Greek Court held that because Karvelis' injury occurred aboard a Greek flag ship—an extension of Greek territory—Greek law should apply. This view of conflicts of law is the same as this Court's reasoning in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). In contrast, the District Court here applied United States law even though the ship was not owned or controlled by United States citizens because "the foreign shipowner has such a strong presence in this country that withholding from it the obligations of the Jones Act would grant it an unfair competitive edge over domestic shipowners." (21a).

Although the United States judgment might be enforceable in United States courts,[1] it is possible that enforcement attempts will be made outside the United States, where more traditional conflict of law values hold force. A third country, asked to enforce the Greek judgment or United States judgment, might refuse to enforce the United States judgment. At stake here, therefore, is the protection of the effectiveness of United States judgments through a review of United States' approach to conflicts of laws in foreign seamen cases.

---

1 Karvelis has not been able to enforce his judgment in the United States.

The impingement on the laws of another country also makes it necessary to reexamine the constitutional limits on the application of United States law in foreign seamen cases. This Court has held that a state violates the due process clause of the fourteenth amendment by applying its law to a foreign transaction where its interest in the transaction is "slight." *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). That thought has been repeated in dictum in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). However, because *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970) did not discuss the due process issue, the question of due process limitations in foreign seamen cases has never been closely examined. *See De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied* 435 U.S. 904 (1978).

This Court has found that a state's interest in an injury within its borders is constitutionally sufficient to justify applying its laws to an employer-employee relationship of a sister state. *Carroll v. Lanza*, 349 U.S. 408 (1955); *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939). However, those cases occurred in a full, faith and credit context and are perhaps only awkwardly comparable to a foreign seaman's injury aboard a foreign flag ship in United States waters.

When a resident alien attempts to escape the obligations of other United States citizens, the United States has more than a slight interest for due process purposes in applying its own law to an injury on a ship controlled by that resident alien, as this Court impliedly held in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). But less clear is the United States' interest where the beneficial shipowners are not United States citizens or residents and when they reside in the same country as the injured seaman.

Finally, the lower courts are in disarray over the application of the factors deemed relevant to choice of law in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). *Lauritzen* required the courts to

weigh seven factors in making a choice of law determination.[2] The *Rhoditis* decision adds one more factor: the "base of operations" of the shipowner. 398 U.S. at 309. However, the lower courts, preoccupied with the "base of operations" test have added a myriad of factors to determine whether United States law should be applied.

The first additional factor has been the number of calls made by a ship to United States ports and the percentage they represent of total calls. E.g. *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir.) *cert. denied*, 417 U.S. 947 (1974). The second factor is the total revenue the ship earned in comparison to the amount earned on United States inbound or outbound voyages. *Rodriguez v. Flota Mercante Grancolombiana S.A.*, 703 F.2d 1069 (9th Cir.) *cert. denied* 464 U.S. 820 (1983). The third factor is the location of the managing or chartering agents and their relationship to the shipowner. E.g. *Mattes v. National Hellenic American Lines*, S.A., 427 F.Supp. 619 (S.D.N.Y. 1977). The fourth factor has been the advertising and marketing schemes of the shipowner, e.g. *Antypas v. Cia. Maritima San Basilio S.A.*, 541 F.2d 307 (2d Cir. 1976) *cert. denied* 429 U.S. 1098 (1977). A fifth factor has been where the vessel's earnings are collected and expenses paid. *Antypas v. Cia. Maritima San Basilio S.A.*, *supra*.

Still other factors have been deemed relevant, such as where the vessel has been maintained, *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028 (5th Cir. 1984); who "substantially" finances the vessel, *Szumlicz v. Norwegian America Line, Inc.*, 698 F.2d 1192, 1194 (11th Cir. 1983) and other United States business ventures in which the beneficial owners might engage. *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976).

Analysis of these factors often is exhaustive, complex and inconclusive. The shipowner must produce in discovery records

---

2 Those seven factors are: (1) place of wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured person; (4) allegiance of defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; and (7) law of the forum. 345 U.S. at 583, 586, 589, 591.

of earnings with breakdowns to show United States cargo (or passenger) earnings, itineraries of vessels, copies of mortgages, contracts with agents, charter parties, voyage accounts, repair records and records regarding other businesses engaged in by the benefical owner. Depositions, both here and abroad, must be taken of the beneficial shipowners, their employees, managing and chartering agents and bank personnel. Not only is consideration of these records and testimony a consummate waste of precious judicial time and energy and an unnecessary diversion of resources to litigation expense but the whole process has little relevance to traditional choice of law analysis. *Cf. The Restatement of the Law, Conflict of Law* § 377 (1934); *Restatement Second, Conflict of Law* § 379.

No guidance exists for how these factors are to be weighed and, not surprisingly, there is great conflict among the circuits[3]. The second circuit finds that substantial contact with the United States is sufficient to apply United States law. *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir.) *cert. denied*, 417 U.S. 947 (1974). The ninth circuit departs from the second circuit by reasoning that the substantiality of contacts must be weighed against those of the state whose competing laws are involved. *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). The third circuit looks at the factors from the point of view of due process and congressional deference to the convention of international law. *De Mateos v. Texaco, Inc.*, 562 F.2d 895, 901 (3d Cir. 1977) *cert. denied* 435 U.S. 904 (1978). The fifth circuit has never clearly set forth how it weighs the factors, other than to state what is not significant. E.g. *Bailey v. Dolphin International Inc.*, 697 F.2d 1268 (5th Cir. 1983).

---

3 The circuits recognize the conflict. Although the third, fifth and ninth circuits seem to agree, at least in drilling rig cases, that United States ownership, alone, will not suffice to apply United States law, the fifth circuit sees the second circuit in conflict with this analysis. *Vaz Porralho v. Keydril Co.*, 696 F.2d 379, 389 (5th Cir. 1983). The third circuit, in *De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977) *cert. denied* 435 U.S. 904 (1978) also takes issue with the second circuit's approach that U.S. beneficial ownership alone is sufficient to apply United States law. *Id.* at 902 n.3.

More frustrating than the disagreement over the analysis of choice of law is the inconsistency of results. This is seen especially in the fifth circuit. Judge Brown ably traces the conflict in his dissent from a denial of *en banc* rehearing in *Fisher v. Agios Nicolaos V.*, 636 F.2d 1107 (5th Cir. 1981) (Brown, J. dissenting): a previously unpublished opinion of the fifth circuit refused to apply United States law to a vessel, most of whose voyages (in a two year period) took place to and from the United States, but which was beneficially owned by Mexican citizens. *Id.* at 1112-1113. In contrast, when the ship made only one call to the United States and was benefically owned by a Greek citizen, the fifth circuit applied United States law. *Fisher v. Agios Nicolaos V.*, 628 F.2d 308 (5th Cir. 1980), *reh. denied* 636 F.2d 1107 (5th Cir. 1981). The *Fisher* majority rationale—that 100% of the ship's calls were made to the United States, because it was the only call the ship had ever made there—stirred such controversy that its author attempted to defend it in a law review article. Tate, *Fisher v. Agios Nicolaos V. and Choice of Law: What was all the Fuss About; and What the Fuss Should Have Been About (Maybe)*, 7 Mar. L. 199 (1982). Still later, unconvincing distinctions with *Fisher* have been made by the Fifth Circuit. E.g. *Volyrakis v. M/V ISABELLE*, 668 F.2d 863 (5th Cir. 1982).

On the other hand, the eleventh circuit followed *Fisher* by applying United States law to a ship beneficially owned by Norwegian citizens, although "substantially financed in the United States" and making frequent calls to United States ports. *Szumlicz v. Norwegian America Lines, Inc.*, 698 F.2d 1192, 1194 (11th Cir. 1983).

The second circuit's decision here and its own opinion in *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976) are in conflict. In both *Koupetoris* and *Karvelis*, the shipowner carried out its New York activities through an agent who drew against a shipowner's bank account, paid the shipowner's expenses and provided the shipowner with an accounting of collection of payments; the vessels made frequent calls

to United States ports; and the shipowner had other business in the United States. Neither the lower court nor the second circuit, in this matter, addressed *Koupetoris*.

The ninth circuit, on facts quite similar to this case, came to the opposite result and held that United States law did not apply to a Columbian shipowner, even though $93 million in revenue was earned from United States cargoes. *Rodriguez v. Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983). Similarly, when a Spanish seaman sued a Liberian shipowner, whose base of operations was in San Francisco, the ninth circuit favored Spanish law. *Pereira v. Utah Transport, Inc.*, 764 F.2d 686 (9th Cir. 1985) *cert. dismissed* 106 S.Ct. 1253 (1986). But when a Greek seaman was injured aboard a Greek vessel which had a base of operations in the United States, United States law was applied. *Dalla v. Atlas Maritime Co.*, 771 F.2d 1277 (9th Cir. 1985).

The lower courts have no guidance on weighing the factors set forth in *Lauritzen* and *Rhoditis*. A more simple test is needed: one that is more in conformance with international conflict of law analysis and one which more precisely delineates the limits of due process in the application of United States law.

CONCLUSION

United States judgments should be protected by bringing conflicts of law analysis in foreign seamen's cases into line with international conflict of law jurisprudence. When United States law is applied for no other reason than the shipowner competes with domestic shipping, due process is violated. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. WALSH
Counsel for Petitioners
80 Pine Street
New York, New York 10005
(212) 425-1900

FREEHILL, HOGAN & MAHAR
80 Pine Street
New York, New York 10005

Of Counsel

APPENDIX

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—August Term, 1986

(Argued September 17, 1986

Decided November 21, 1986)

Docket No. 86-7418

GEORGE KARVELIS,

Plaintiff-Appellee,

—v.—

CONSTELLATION LINES S.A., ENTEMAR SHIPPING CO., S.A., CONSTELLATION LINES, INC., and CONSTELLATION NAVIGATION, INC., as agent for CONSTELLATION LINES S.A., ENTEMAR SHIPPING CO., S.A., and CONSTELLATION NAVIGATION, INC.,

Defendants,

CONSTELLATION LINES S.A. and
ENTEMAR SHIPPING CO., S.A.,

Defendants-Appellants.

Before:

OAKES, MINER, and MAHONEY,
Circuit Judges.

Appeal from a judgment after a jury verdict in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, finding foreign ship owner and operator liable for negligence under the Jones Act and for unseaworthiness under general maritime law for injuries to foreign seaman that occurred while vessel was in a U.S. port.

Affirmed.

WILLIAM M. KIMBALL, New York, NY (John J. Walsh, Freehill, Hogan & Mahar, New York, NY, of counsel), *for Defendants-Appellants.*

JETHRO M. EISENSTEIN, New York, NY (Harvey J. Kaufman, Paul K. Feldman, Meyers, Tersigni, Kaufman, Lurie, Feldman & Gray; Friedman & Eisenstein, New York, NY, of counsel), *for Plaintiff-Appellee.*

OAKES, *Circuit Judge*:

The operator and owner of a Greek-flag vessel, Constellation Lines S.A. ("Constellation") and Entemar Shipping Co., S.A. ("Entemar") respectively, appeal a judgment after a jury verdict in favor of a Greek seaman, George Karvelis, who was injured while working aboard the vessel Constellation Enterprise. The United States District Court for the Southern District of New York, Robert L. Carter, Judge, entered judgment for $300,000 on Karvelis's claims of negligence under the Jones Act, 46 U.S.C. § 688 (1982), and unseaworthiness under general maritime law. The jury expressly found Karvelis not contributorily negligent. Entemar and Constellation argue on appeal that the district court lacked subject matter jurisdiction, that the identity of any Jones Act employer of Karvelis was a jury question, that only the shipowner, Entemar, could be liable under general maritime law for unseaworthiness, that Judge Carter erroneously charged and failed to charge the jury in connection with contributory negligence, and that there must be a new trial if any of the defendants' directed verdict motions to dismiss the unseaworthiness and negligence claims for insufficient proof should have been granted. We affirm.

Applying the tests laid down by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), the district court looked behind "the facade of the operation," *Hellenic Lines*, 398 U.S. at 310, toward "the actual operational contacts that this ship and this owner have with the United States," *id.*, to hold that there was Jones Act jurisdiction. *Karvelis v. Constellation Lines S.A.*, 608 F. Supp. 966, 971 (S.D.N.Y. 1985). For the reasons stated in Judge Carter's opinion, *id.* at 968-71, and on the facts set

forth therein, we agree that there was subject matter jurisdiction under the Jones Act. While the appellants' brief does not make the suggestion, their oral argument was to the effect that with the changing composition of the United States Supreme Court since the decision in *Hellenic Lines*, that case and the "operational gloss" it put on the *Lauritzen* test, 398 U.S. at 308-10, would not now be credited by the Supreme Court. We decline the exercise. Appellants have pointed to no case, no commentaries, no statutes, and no authorities that would lead us to believe that the Supreme Court has overruled *Hellenic Lines sub silentio* or would do so were it given the opportunity. *Cf. Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985) (rejecting the argument that *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), had been overruled), *aff'd*, 106 S. Ct. 1922 (1986).

Constellation was found liable for negligence under the Jones Act and both Constellation and Entemar were found liable under the general maritime law. Appellants argue that the identity of Karvelis's employer for Jones Act purposes is a jury question and that it was error to charge that Constellation was the employer as a matter of law. Then appellants argue that only a ship's owner may be liable under general maritime law for unseaworthiness, that Entemar is the owner, and that Constellation should not have been held liable because it was merely the ship's nonowning operator. These arguments, side by side, plunge us into the Serbonian Bog, *see* J. Milton, *Paradise Lost*, Book II, line 592 (1667); *Landress v. Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting); *Diematic Manufacturing Corp. v. Packaging Industries, Inc.*, 516 F.2d 975, 978 (2d Cir.)

(Mulligan, J.), *cert. denied*, 423 U.S. 913 (1975), that is the law relating to a seaman's recovery for death and injury. We use this term advisedly, for the leading commentators refer in their treatise to the fact that "[t]he perils of the sea, which mariners suffer and shipowners insure against, have met their match in the perils of judicial review." G. Gilmore & C. Black, *The Law of Admiralty* § 6-1, at 272 (2d ed. 1975). The title of another commentator's article bears this out. *See* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158. As Gilmore and Black point out,

> The Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery. As a matter of jurisprudential elegance or even of common sense it would have been desirable (and would still be desirable) to abandon the cumbersome fiction that two causes of action are involved and to restate the seaman's cause of action for death or injury as being what it is. That has not been done and, in all probability, will never be done. After ten or fifteen years of confusion the admiralty lawyers and the admiralty judges came to understand that the Jones Act count and the unseaworthiness count are Siamese twins. The only danger here is the possibility that a non-admiralty lawyer will be retained to handle such a case or that a non-admiralty judge will be called on to decide one.

G. Gilmore & C. Black, *supra*, § 6-38, at 383.

Presented with the "Siamese twins," we do nevertheless have to examine each one, for no election between the counts is required and the Supreme Court, at least in its

last five-to-four vote on the issue, maintains that "the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971); *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

Considering first the Jones Act count, our court has held that only an employer can be liable under the Jones Act. *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 473 (2d Cir.), *cert. denied*, 417 U.S. 947 (1974); *see also Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 170 (2d Cir. 1973). *But see* G. Gilmore & C. Black, *supra*, § 6-21(a), at 338-39 (recommending reconsideration of the assumption that the only possible Jones Act defendant is a single employer). We believe that Judge Carter did not err when he decided that Constellation was Karvelis's employer rather than put the question as to who was the employer to the jury. The facts that defendant's answer to plaintiff's Interrogatory 50 stated that Entemar was the employer and that the employment contract on Constellation's form identified Entemar as the shipowner (from which it might be implied that Entemar was the employer, *see Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 674 n.2 (2d Cir. 1971)) are irrelevant. Exhibit 1, Karvelis's employment contract, was on Constellation's form, as were his wage receipts. Constellation managed the ship and operated it, chartering the vessel. It paid for Karvelis's transportation from Greece to the United States to join the ship. In the circumstances, there was no sufficient evidence to go to the jury that Entemar, rather than Constellation, was the employer.

We turn next to appellants' argument that Constellation was not the owner and so could not be liable on the unseaworthiness count. There is language in the opinions that the obligation of seaworthiness is "peculiarly and exclusively the obligation of the owner [and] one he cannot delegate." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 100 (1946). But in *Reed v. The Yaka*, 373 U.S. 410, 412-13 (1963), the Court held that a bareboat charterer, being in "full possession and control" of a vessel, may be treated as an owner, "generally called owner *pro hac vice*," and may be personally liable for the unseaworthiness of a chartered vessel. In this case, though Entemar was the record owner with title to the vessel, Constellation was much more than a mere time or voyage charterer. The district court held that Constellation also operated and managed the vessel at the time Karvelis sustained his injury. As operator, manager, and charterer, Constellation had such control and possession of the vessel as to be its owner *pro hac vice*. *See id.*; *Eskine v. United Barge Co.*, 484 F.2d 1194, 1196 (5th Cir. 1973). Hence, Constellation could properly be held liable on the unseaworthiness count.

The district court indicated in accordance with Fed. R. Civ. P. 51 that it would charge at least the substance of the defendant's contributory negligence requests 19, 20, 22, and 23, which read as set forth in the margin.[1]

---

[1] 19. If any negligence by plaintiff played any part, even the slightest, in causing his injury, then you must find that he was contributorily negligent.

20. Contributory negligence has been defined as failure to use due care for one's own safety.

. . . .

22. Every person, plaintiff included, has a legal duty to make reasonable use of his own senses in order to avoid injury to himself,

Appellants claim that it did not do so. We disagree. The court's charge, also set forth in the margin,[2] does so in substance.

. . . and failure to do so is contributory negligence as a matter of law.

23. A crewman should exercise due care with respect to his work place and working methods and may not act in disregard of his own safety.

(Citations omitted.)

2 Negligence is the failure to use reasonable care and reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

. . . .

The defendant contends that—I might as well say the defendants, because this issue of contributory negligence applies also to the seaworthiness claim.

The defendants contend that the plaintiff himself was negligent and that such negligence was a legal cause for his own injury. This is a defensive claim and the burden of proving that claim by a preponderance of the evidence is upon the defendant who must establish, one, that the plaintiff was also negligent and, two, that such negligence was a proximate cause of the damage which the plaintiff sustained.

If you find in favor of the defendants on this defense, that will not prevent recovery by the plaintiff. It only reduces the amount of the plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the plaintiff, that his own negligence was, for example, 10 percent responsible for his own damage, then you may or you would fill in that percentage as your finding on the special verdict form that I will explain to you shortly.

If you find that the plaintiff was 20 percent responsible for his damage, then you will reduce the amount by 20 percent. If it is 30, so forth and so on.

Your finding that the plaintiff was in part responsible will not prevent the plaintiff from recovering. You will merely reduce the plaintiff's total damages by the percentage that you insert.

As I have indicated, I'm not suggesting, one, that you find that he was contributory [*sic*] negligent or, two, what percentage, but this is the process that you go through. You may find he was 1 percent negligent or 99 percent or you may find he was not contributorily negligent at all.

Entemar and Constellation were represented at trial by the same counsel, William M. Kimball, Esquire. He moved on behalf of Entemar to dismiss any negligence or unseaworthiness claim against Entemar pertaining to the space underneath the cables on the starboard side of a winch, the cables on which served to raise and lower the "car deck" of the Constellation Enterprise, a so-called "roll on-roll off" vessel. The argument is that there was no notice to or negligence by Entemar because it did not know and could not reasonably have known that Karvelis would use that space as he did, trying to get out of the way of the deck, which he feared would fall because one of the cables was overriding. But the evidence was that Karvelis slipped and grabbed a moving cable and that his hand got stuck on the cable. According to expert testimony, his gloves apparently snagged on cable "fish hooks," pulling his hand into the block of the winch. Entemar, then, was not being held liable for negligence under the Jones Act but solely for unseaworthiness under the general maritime law and notice or negligence is therefore immaterial. *Mitchell v. Trawler Racer, Inc.*, *supra*; *see also* G. Gilmore & C. Black, *supra*, § 6-44(a), at 401-04. True, counsel did argue that there could be no unseaworthiness with respect to a "fish hook" because it was never intended that anybody grab the cable while it was being moved. However, Karvelis had been specifically assigned to the task of lubricating and adjusting the cables. He was given no instruction manuals or diagrams with respect to the equipment. The cables had to be adjusted to spool evenly and to do that the adjustment bolts had to be loosened and a safety device holding the end of the cable moved. Then Karvelis and his coworker were manually to pull wire from the safety apparatus so as to make cables of even length. Thus, there was evi-

dence to show that it was indeed contemplated that Karvelis would handle the cable with his hands. While it may not have been contemplated that he would slip and grab a moving cable, the fact is that he did so. The evidence permitted the inference on the basis of the expert testimony that he must have snagged his glove on cable "fish hooks."

To the extent that a motion for a directed verdict was made as to Constellation on the negligence count, it would be immaterial since Constellation was also held liable on the unseaworthiness count. Even so, there was ample evidence of negligence in (a) Constellation's failure to give Karvelis appropriate instructions, diagrams or manuals with respect to the equipment and (b) the chief mate's operating the winches at a control position from which he was unable to see the winches. Though Karvelis was given a walkie-talkie, he received no communication from the chief mate when the cable started to pile on top of itself. It was because he was unable to contact the chief mate by walkie-talkie, and because he was afraid that the cable would part with tension with the possibly disastrous result of dropping the "car deck" on him, that Karvelis moved away from his position by the winch and moved under the cables. Expert testimony was given to the effect that it was "totally unacceptable" to have someone operating a winch without being able to see it. Proper practice called for stationing signalmen for a positive line of communication.

Finally, Karvelis argues that the costs incurred in preparing the supplemental appendix should be taxed to appellants. We agree. The original appendix filed in this action left out entirely Karvelis's response to the appellants' motion for summary judgment as well as signifi-

cant excerpts from the testimony of several witnesses. This material, which was included in the supplemental appendix, was relevant and important in deciding this case. Therefore, we direct that the cost of the supplemental appendix be included among the taxable costs of this case pursuant to Fed. R. App. P. 30(b).

Judgment affirmed.

MAHONEY, J., concurring in the result.

I concur in the judgment reached by the majority, and differ only as to its determination that Constellation was properly held liable on the unseaworthiness count as owner *pro hac vice*.

The majority relies upon *Reed v. The Yaka*, 373 U.S. 410 (1963), where a bareboat charterer was deemed as owner *pro hac vice* and accordingly liable for unseaworthiness, and *Eskine v. United Barge Company*, 484 F.2d 1194 (5th Cir. 1973), reaching the same result where "[t]he relationship was, or was analogous to, that existing under a bareboat charter." *Id.* at 1196. I do not believe that the relationship between Entemar and Constellation meets the requirements of *Reed/Eskine* for a finding that Constellation was the owner *pro hac vice* of the vessel Constellation Enterprise when Karvelis was injured.

Reed described the characteristics of a bareboat charter as follows.

> Pan-Atlantic was operating the *Yaka* as demisee or bareboat charterer from Waterman. Under such arrangements full possession and control of the vessel

> are delivered up to the charterer for a period of time. *The ship is then directed by its Master and manned by his crew*; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner *pro hac vice*.

373 U.S. at 412 (emphasis added) (footnotes omitted). *See also Guzman v. Pichirilo*, 369 U.S. 698, 699-700 (1962) ("To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee[,]" quoting *United States v. Shea*, 152 U.S. 178, 186 (1894)).

In *Eskine*, the plaintiff was injured aboard a barge used by his employer, Cargill, for the delivery of salt. 484 F.2d at 1195. Cargill owned no barges. The evidence failed to establish the identity or ownership of the barge. *Id.* Nevertheless, the Fifth Circuit affirmed the district court's holding that Cargill was the barge's owner *pro hac vice*. It did so however, only after noting that the barge was moved to and from Cargill's loading dock by a Cargill tugboat; it was made fast to the dock by Cargill employees; and it was within the exclusive control of Cargill while being loaded. *Id.* at 1196. Furthermore, "[u]nlike a vessel with motive power that is commanded by a master, vessels without motive power [such as the barge in *Eskine*] are essentially subject to the control and direction of the tug that tows them." *Keller v. United States*, 557 F. Supp. 1218, 1228-29 (D.N.H. 1983).

Here, it appears that the vessel was owned by Entemar, and its crew and master were supplied by Entemar, which

was held liable as owner for unseaworthiness. Constellation was the manager of the vessel, whose function was to find freight that the vessel could carry at a profit and see to it that the vessel was carrying such freight, and is also variously described in the record as its time charterer or charterer and operator. Especially since the court below instructed the jury that "every shipowner or operator" is liable for unseaworthiness, a standard that goes well beyond the rule established by *Reed/Eskine*, and did not include in its charge or verdict form any requirement that any *Reed/Eskine* standards had to be satisfied to hold Constellation liable for unseaworthiness, I do not believe that we should affirm as to Constellation's liability for unseaworthiness on this record.

Since Constellation was properly held liable under the Jones Act, however, I concur in the judgment of the majority.

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 2609 (RLC)

GEORGE KARVELIS,

Plaintiff,

—against—

CONSTELLATION LINES SA; ENTEMAR SHIPPING CO. SA; CONSTELLATION LINES, INC.; and CONSTELLATION NAVIGATION, INC.; as agent for ENTEMAR SHIPPING CO. SA, CONSTELLATION LINES SA and CONSTELLATION LINES INC.,

Defendants.

APPEARANCES
Attorneys for Plaintiff

MEYERS TERSIGNI KAUFMAN LURIE FELDMAN & GRAY
630 Third Avenue
New York, New York 10017

Harvey J. Kaufman
Paul K. Feldman
Of Counsel

FRIEDMAN and EISENSTEIN
Co-counsel for Plaintiff

Attorneys for Defendants

ALEXANDER, ASCH, SCHWARTZ & COHEN P.C.
41 East 42nd Street
New York, New York 10017

Joseph Arthur Cohen
Christopher P. Di Giulio
Of Counsel

CARTER, District Judge

George Karvelis, a Greek seaman, was injured on March 24, 1984, while working aboard the Greek flagship Constellation Enterprise ("Enterprise") in port at Newark, New Jersey. His left hand became caught in the machinery that elevates and lowers the auto deck, and four of his fingers were severed.

Karvelis bought suit under the Jones Act, 46 U.S.C. § 688, and general maritime law against the Enterprise's owner, Entemar Shipping Co. SA ("Entemar"), its charterer, Constellation Lines SA ("Lines"), and against Entemar's and Lines' New York agent, Constellation Navigation, Inc. ("Navigation").[1]

Entemar and Lines are Panamanian corporations, with their principal places of business in Greece. Both corporations are completely owned by Spilios A. Sofianopoulos, Nicolaos A. Spyrakos, and Dionyssios G. Vlachos, citizens and residents of Greece. Navigation is a New York corporation. Neither Sofianopoulos, Spyrakos nor Vlachos owns stock in Navigation.

Defendants have moved to dismiss the complaint against Entemar and Lines for lack of subject matter jurisdiction, or, in the alternative, on grounds of *forum non conveniens*. No motion has been made concerning the action against defendant Navigation.

---

1. Karvelis also named as a defendant Constellation Lines, Inc. It is unclear who or what that entity is. Karvelis asserts in this complaint that it is a New York corporation and that it and Constellation Lines SA "constitute the shipping lines of which the vessel CONSTELLATION ENTERPRISE is a part." Defendants Entemar, Lines and Navigation do not address this assertion in their answer. Counsel representing Entemar, Lines and Navigation does not purport to represent Constellation Lines, Inc., and Constellation Lines, Inc. is not represented by separate counsel. No further mention of Constellation Lines, Inc. is made in the parties' papers.

DISCUSSION

Defendants argue that Greek law governs this case, and therefore that the court cannot assert subject matter jurisdiction[2] over the case[3] under the Jones Act. To determine whether the Jones Act governs, the court must apply the test established by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, *reh. denied*, 400 U.S. 856 (1970). In *Lauritzen, supra*, 345 U.S. at 582-92, the Court ruled that the Jones Act comes into play where there are substantial contacts between the event in

2. It is unclear whether this motion should be treated as one for lack of subject matter jurisdiction or for failure to state a claim. On the one hand, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, *reh. denied*, 359 U.S. 962 (1959), the Supreme Court treated similar motions as ones for failure to state a claim. Quoting from *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951), the *Romero* court noted, "[a]s frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Romero, supra*, 358 U.S. at 359. In *Lauritzen and Romero*, as in the instant case, the plaintiff asserted a substantial claim that the Jones Act afforded him a right of recovery for his employer's negligence. "Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights." *Id.* On the other hand, in *Hellenic Lines Ltd. v. Rhoditis*, 345 U.S. 306, *reh. denied*, 400 U.S. 856 (1970), the Court explicitly treated the same sort of motion as a motion for lack of subject matter jurisdiction. It is not apparent whether the Court's language in *Hellenic Lines* was intended to overrule *Lauritzen* and *Romero*, or was merely an unguarded and passing dictum. See *Rodriguez v. Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069 (9th Cir.), *cert. denied*, 464 U.S. 820, 104 S.Ct. 84 (1983). The court need not decide the issue, since its approach would be similar in either case.

3. The complaint in this case alleges three claims for relief, the first under the Jones Act and the latter two under general maritime law. Plaintiff claims this court has jurisdiction only under the Jones Act, and not under general maritime law. I agree that the court does not have jurisdiction to adjudicate general maritime law claims brought by a foreign plaintiff against foreign defendants. *Romero v. International Terminal Operating Co., supra* n.2.

question and the United States. The Court laid out seven determinative factors for courts to consider: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injuried plaintiff; (4) the allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the accessibility of a foreign forum; and (7) the law of the forum.

In *Hellenic Lines, supra*, 398 U.S. at 308-09, the Court added to these seven factors the "base of operations of the shipowner." Noting that the *Lauritzen* test was not a mechanical one, the Court emphasized that each factor must be weighed in light of the national interest that would be served by the application of the Jones Act. If a ship is more than "a casual visitor" to the United States and the shipowner is "engaged in an extensive business operation in this country," then the Jones Act should apply (even if most other factors point toward application of foreign law); otherwise, the Court reasoned, foreign shipowners operating in American waters would be allowed to escape the obligations of a Jones Act employer, and would be granted an unfair competitive advantage over their American counterparts. *Id.* at 309-10.

Most of the *Lauritzen* factors in this case point to application of Greek law. The plaintiff, defendants, and vessel are Greek. Plaintiff's articles of employment are Greek, and call for the resolution of all disputes arising out of his employment in Greek courts.[4] Karvelis has access to a Greek forum. The only *Lauritzen* factors favoring United States law are the place of the accident (New Jersey) and the law of the forum. These are not weighty factors. *E.g. Pandazopoulos v. Universal Cruise Line, Inc.*, 365 F.Supp. 208 (S.D.N.Y. 1973) (Cannella, J.).

---

4. That Karvelis' contract calls for the resolution in Greece of all disputes arising out of his employment does not compel this court to deny plaintiff access to a United States forum. *See Hellenic Lines v. Rhoditis, supra* n.2, and *Antypas v. Compania Martima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977) (cases adjudicated in United States forum despite similar contract provisions).

Plaintiff contends that the Jones Act should apply nevertheless because the defendant-shipowner has a "base of operations" in New York. *See Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir.), *cert. denied sub nom. Ekberg Shipping Corp. v. Moncada*, 417 U.S. 947 (1974) ("substantiality [of contacts is] to be determined on an absolute scale and not by comparing or balancing the presence of certain contacts with the absence of others"). The evidence submitted to the court shows that, to a significant extent, the Enterprise is managed from New York. In an agreement dated May 5, 1978, Lines, in Greece, delegated to Navigation, in New York, authority to be Lines' "general agents to perform all of the customary services of a traffic representative . . ." (Plaintiff's exh. 6 ¶ 1). As such, Navigation solicited cargo for the Enterprise—nearly 70 percent of the cargo bound for the Mediterranean and 50 percent of the cargo bound for the United States was booked by Navigation. (Christophides[5] aff. ¶ 10). Navigation collected lines' revenues, and deposited them in two "multi-million" dollar accounts in New York banks in Lines' name. (Christophides dep. at 71). Navigation had the authority to withdraw from these accounts to pay the Enterprise's expenses. Navigation also arranged for stevedoring, fuel, and tugboats for the vessel, and handled berthing and traffic matters. Navigation advertised in the Journal of Commerce as the general agent for Constellation Line.[6] These activities were all handled from New York, without the direction, supervision, or control of the owners and charterers in Greece. (Christophides aff. ¶ 7).

The Enterprise was hardly a "casual visitor" to the United States. For the fifteen months preceding Karvelis' injury, the Enterprise was engaged in regular transatlantic trade, carrying food items from Mediterranean ports to the Atlantic seaboard

---

5. Orestes G. Christophides is the director of Navigation.

6. Constellation Line is the name Lines uses, as per agreement with Navigation, to designate its transatlantic shipping line. (Plaintiff's exh. 6 ¶ 19).

and returning to the Mediterranean with American-made tractors, military hardware, and other heavy machinery. (Christophides dep. at 35-36). The ship's itinerary shows that all nine voyages in those fifteen months connected United States ports—chiefly New York, Charleston, S.C., and Baltimore, Md.—with ports in the Mediterranean. (Plaintiff's exh. 3). Aside from the time the Enterprise was at sea, it was more often to be found in an American port than in the port of any other country. (*Id.*).

The Enterprise earned substantial income from cargo originating in or bound for the United States. This is an important consideration in determining whether the foreign defendants should be deemed to be in competition with American shippers. *Hellenic Lines, supra*, 398 U.S. at 310. Annually, the vessel earned approximately $7 to $8.5 million on cargo shipped from the United States to the Mediterranean, and $1.5 to $2.5 million[7] on cargo shipped the other way. (Christophides dep. at 37-38). According to plaintiff, this constituted 100 percent of the Enterprise's revenues.[8] The Enterprise was thus more than just a periodic visitor to the United States; it was in direct competition with American shippers in an American market. And in addition to the Enterprise, Lines and Entemar

---

7. The transcript of Christophides' testimony regarding revenue from United States-bound cargo is a bit confused, owing to what are apparently typographical errors. It reads: "A million and a half, 20 million. It could be as much as 2-1/2 of its capacity." The court reads this as "A million and a half, 2 million. It could be as much as 2-1/2 if [*sic*] it's [*sic*] capacity." This reading makes sense in the larger context of the testimony; it was proposed by plaintiff and not objected to by defendants.

8. This assertion by plaintiff is not completely supported by the evidence before the court. There is no evidence that in addition to importing goods to and exporting goods from the United States, the Enterprise did not carry goods from one Mediterranean port to another, thus earning some revenue not counted in United States-related trade. By the same token, there is also no evidence to lead the court to suspect that the Enterprise is so engaged, and defendants have not challenged plaintiff's assertion. At any rate, the court is satisfied that the Enterprise's revenue from cargo originating in or bound for the United States is substantial.

ran three other ships on their Constellation Line, linking the United States with the Mediterranean. (Karvelis aff. ¶ 14).

Moreover, Sofianapoulos, Vlachos and Spyrakos have some direct involvement in the management of business ventures from American shores. During 1983 and 1984, Spyrakos and Vlachos would come to the United States twice annually on business, and would work out of Navigation's New York offices. (Christophides dep. at 83-85). Sofianapoulos would come to this country, too, about once a year. (*Id.*). In addition, the three men own part of two shipping-related corporations in the United States. Pursuant to an agreement with Navigation, Sofianapoulos, Vlachos and Spyrakos could designate an entity to own 50 percent of three South Carolina corporations located in Charleston, S.C.—Wando Stevedoring Co., Inc., Trident Shipping Agency, and Romney Realty. Akti[9] Shipping and Investment SA, a Panamanian corporation, was named. (Under the agreement, Navigation owned the other 50 percent of the South Carolina corporations). Though the precise extent of Sofianapoulos', Vlachos', and Spyrakos' ownership interest in Akti is not clear, defendants have conceded that the three are shareholders. (Defendants' brief at 8). Moreover, it is undisputed that Spyrakos is a director of Wando and Trident (though defendants claim that Spyrakos is not deeply involved, and is a director in name only). Trident is Navigation's Charleston sub-agent, and Wando performs stevedoring services for Lines' vessels, including the Enterprise. (Christophides dep. at 89-91). Trident and Wando rent their office space from Romney Realty. (Christophides dep. at 95-97).

Defendants argue that the Jones Act should not apply because "there exists no common identity between the Greek owners of the vessel involved herein and its agents in this country." (Defendants' brief at 7). They note that Sofianapoulos, Vlachos and Spyrakos own no shares of Navigation, and they point out that in *Antypas v. Compania Maritima San*

---

9. The name apparently derives from Lines' and Entermar's address in Piraeus—99 Akti Miaouli Street.

Basilio, S.A., 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977), the Second Circuit held the Jones Act applicable only after finding that the principal shareholders of the foreign shipowner corporation also owned stock in the ship's New York agent.

Defendants also cite *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982), for the proposition that the existence of an American agent who is not the "alter ego" of the foreign shipowner is insufficient to justify application of American law.

It is true that the argument for application of the Jones Act would be stronger in this case if Sofianapoulos, Vlachos and Spyrakos were shareholders of Navigation. The fact that they are not shareholders, however, does not compel the conclusion that the Jones Act does *not* apply. As the Supreme Court noted in *Hellenic Lines, supra*, 398 U.S. at 308, the test for applicability of the Jones Act is not mechanical; no one factor—including whether the alien defendant has an ownership interest in its American agent—should be considered talismanic. The question for the court is whether the foreign shipowner has such a strong presence in this country that withholding from it the obligations of the Jones Act would grant it an unfair competitive edge over domestic shipowners. It is possible for a foreign shipowner to have such a presence without owning stock in its agent in the United States.

Thus, in *Antypas*, the fact that the shareholders of the foreign shipowner also owned stock in the domestic agent was a factor in the court's decision to apply the Jones Act, but is was not the only factor. Other factors were that the vessel was operated from New York by a sub-agent who had been given "full and complete responsibility for the booking and solicitation of cargo and passengers and the collection of freight and passenger revenues for the account of [the shipping lines' vessels and] was given the power to fix rates, allocate tonnage and space sailings." *Antypas, supra*, 541 F.2d at 309. The court noted that the New York sub-agent also solicited business for

the vessels by advertising in various journals. It also collected in New York the earnings from the vessel involved in the accident, and paid that vessel's expenses.

Similarly, the fact that the foreign shipowner in *Volyrakis* did not own the domestic agent was a factor in the Fifth Circuit's decision not to apply the Jones Act, but not the only factor. There, the court found that there was scant contact with this country by the vessel. It had visited the United States only three times since the defendant bought it. *Volyrakis, supra*, 668 F.2d at 864. Moreover, there was no evidence that the shipowner earned substantial income from United States trade, or that it was otherwise significantly involved in United States commerce. It was therefore not necessary to apply the Jones Act to insure competitive equilibrium between the defendants and domestic shipowners.

Even if some ownership interest in an American base of operations were crucial, Sofianapoulos, Vlachos and Spyrakos do have some ownership interest in the Charleston corporations, Trident, Wando and Romney. The fact that this interest is held through a separate corporation, Akti, is unimportant. In assessing Jones Act applicability, the court is instructed to look behind "the facade of the operation[.]" *Hellenic Lines, supra*, 398 U.S. at 310.

The court has taken a "cold objective look at the actual operational contacts that this ship and this owner have with the United States," *id.*, and concludes that defendants' contacts are substantial. *Cf. Mattes v. National Hellenic American Line, S.A.*, 427 F.Supp. 619 (S.D.N.Y. 1977) (Lasker, J.). The Jones Act is applicable, to insure competitive equilibrium between foreign and domestic shipowners.

Defendants urge the court to dismiss the case nonetheless, under the doctrine of *forum non conveniens*. It is within the court's discretion to decline jurisdiction despite the Jones Act applicability. *Cruz v. Maritime Company of Philippines*, 702 F.2d 47 (2d Cir. 1983). Here, as with all *forum non conveniens* motions, the basic objective of the inquiry is to ensure that the

situs of the trial is convenient. There is a strong presumption in favor of the plaintiff's choice of forum unless private and public interest considerations clearly point to trial in the alternate forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 966-68 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084, *reh. denied*, 451 U.S. 934 (1981). In this case, the presumption favoring plaintiff's choice applies with less force than would ordinarily be the case since plaintiff's is not a citizen of the chosen forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56, *reh. denied*, 455 U.S. 928 (1982). Nonetheless, the burden remains on the defendants to demonstrate why the presumption in favor of plaintiff's choice—a weakened presumption though it may be—should be disturbed. See *Ayers v. Arabian American Oil Co.*, 571 F.Supp. 707, 709 (S.D.N.Y. 1983) (Carter, J.) (foreign plaintiffs' choice of forum "is still entitled to some deference").

The private interests in this case do not point toward dismissal. The defense witnesses to the accident are Greek, but they are seamen under defendants' control, and they stop in United States ports at least as frequently as in Greek ones. Plaintiff's witnesses, on the other hand—his doctors and his expert investigator—are Americans, not subject to process in Greece. To the extent that documents will have to be produced at trial, the parties stated that some documents are in Greece, some are aboard ship, and some are in the United States. This factor is therefore inconclusive. Defendants argue that time and money will have to be expended to translate testimony and documents from the Greek. This may be true, but is not a hardship of sufficient magnitude to justify dismissal.

Nor do the public interests involved tip the scale in favor of dismissal. Though Greece has an interest in adjudicating a case involving Greek litigants aboard a Greek ship, *Doufexis v. Nagos S.S., Inc.*, 583 F.Supp. 1132 (S.D.N.Y. 1983) (Werker, J.), the United States also has a strong interest in according equal treatment under the Jones Act to foreign and domestic shippers who compete in the American market. If this case

were dismissed and adjudicated in Greece, Greek law, and not the Jones Act, would likely be applied. (Affidavit of defendant's expert, Evangelos Tsouroulis ¶ 5).

Defendant's motion to dismiss is denied.

IT IS SO ORDERED.

Dated: New York, New York
April 12, 1985

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 2609 (RLC)

GEORGE KARVELIS,

Plaintiff,

—against—

CONSTELLATION LINES SA; ENTEMAR SHIPPING CO. SA; CONSTELLATION LINES, INC.; and CONSTELLATION NAVIGATION, INC., as agent for ENTEMAR SHIPPING CO. SA, CONSTELLATION LINES SA and CONSTELLATION LINES, INC.,

Defendants.

Upon the letters received from counsel for the parties to the above-captioned action, both dated January 17, 1985, and counsel having appeared before me in conference on January 18, 1985, it is hereby

ORDERED that defendants are enjoined from proceeding with legal action against plaintiff in Greece pending this Court's decision on defendants' motion to dismiss for lack of jurisdiction and on the grounds of *forum non conveniens*, dated October 31, 1984 and now pending before this Court; and it is further

ORDERED that service of a copy of this Order upon counsel for the defendants by mail shall be deemed good and sufficient service.

SO ORDERED: 1/28/85

January 25, 1985

/s/ Robert L. Carter
U. S. D. J.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 2609 (RLC)

GEORGE KARVELIS,

Plaintiff,

—against—

CONSTELLATION LINES, S.A., ENTEMAR SHIPPING CO., S.A., CONSTELLATION NAVIGATION, INC., as agent for ENTEMAR SHIPPING CO., S.A., CONSTELLATION LINES, INC.,

Defendants.

A Jury Trial having begun before the Honorable Robert L. Carter, U.S.D.J., on April 15, 1986, and at the conclusion of the plaintiff's case, the Court having granted the motion to dismiss the complaint as to the defendant Constellation Navigation, Inc., and the Court having granted the motion of defendant Entemar Shipping Co., S.A., to dismiss the navigation claim; and the trial having continued as to the remaining defendants, and remaining claims; and at the conclusion of the trial the jury having answered the attached "Special Verdict Form" and the jury in so doing having found in favor of the plaintiff in the amount of $300,000.00 as against the defendants; and the defendant Constellation Lines, Inc. having been voluntarily dismissed with the consent of the plaintiff, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment as against the defendants Constellation Lines, S.A.

and Entemar Shipping Co., S.A., in the amount of $300,000.00, and it is further

ORDERED: That the complaint be and it is hereby dmismissed as to defendants Constellation Navigation, Inc. as agent for Entemar Shipping Co., S.A. and Constellation Lines, Inc.

Dated: New York, New York
30 April, 1986

/s/ Raymond F. Burghardt
Clerk

GREEK JUDGMENT

(Translation)

COURT OF FIRST INSTANCE OF PIRAEUS

no: 766/1986

THE SINGLE-MEMBER COURT OF FIRST INSTANCE OF PIRAEUS
(LABOUR DISPUTE PROCEDURE)

Justice, The Judge of the Court of First Instance Constantine Peioglou, who was appointed by the Head Judge of the Court of First Instance.

Secretary Kalliopi Stamatinou.

The Court met in public session at the Court premises on 12th May, 1986 in order to try the suit case no. 2294/84 between:

PLAINTIFFS: 1) ENTERMAR SHIPPING CO SA with registered office in Panama and lawfully represented and 2) CONSTELLATION LINES S.A. with registered office in Panama and lawfully established in Piraeus and which is lawfully represented, represented herein by their lawyer Gerasimos Kalogiras.

DEFENDANT, George Apostol[illegible] Karvelis, a resident of Glossa Skopelos, who was absent and did not appear at all.

At the hearing of the case and when the case was called out from the relevant Court Roll, following the plaintiffs' Notice of Setdown no. 1382/86, the lawyer of the plaintiffs asked that the Court accept all that is setout in his pleadings which he developed in his oral argument.

THE COURT CONSIDERED THE COURT FILE AND JUDGED THE MATTER IN ACCORDANCE WITH THE LAW

The Certificate of Service no. 12173/12.2.1986 of the Court Bailiff of the Piraeus Court of First Instance, Gerasimos Valianatos, which the plaintiffs produce and rely upon, attests

to service upon the Piraeus District Attorney, on behalf of the defendant who is of unknown abode, of lawfully and timely true copies of the Writ and the Notice of Setdown dated 10.2.1986, and they summoned him to today's hearing. Furthermore a summary of the documents served was published in the newspapers "ELEFTHERI ORA" of Athens (issue of 13.2.1986) and "KINONIKI" of Piraeus (issue of 14.2.1986) (see same as produced) in accordance with the provisions of article 135 of the Code of Civil Procedure. Accordingly, since the defendant did not appear at the hearing when the case was called out from the Court Roll in its sequence, he must be tried in default, but the case must be investigated as if all the litigants were present (article 672 of the Court Civil Procedure).

By the action under consideration, the plaintiffs allege that the defendant was engaged on 21.12.1983, by contract of seaman's employment, as a second mate, and was signed-on on board the cargo vessel CONSTELLATION ENTERPRISE GRT 5538 or NRT 2524, which flies the Greek flag, and is owned by the first plaintiff whose lawful representative in Greece is the second plaintiff. The defendant served on board the ship up to 24.3.1984 when, and whilst the vessel was in the Port of New York, he sustained injury to his left-hand and was admitted into a local hospital for treatment. Plaintiffs pray, by reason of an action brought by defendant in the District Court of New York arising from the same labour accident and claiming U.S. $10.000.000 in damages due to their negligence, that it be recognized/declared that there exists no liability of theirs for the payment of this amount and that the defendant be ordered to pay their costs. This action, as negative declaratory action, has been lawfully fiied in accordance with article 70 of the Code of Civil Procedure and was admitted for hearing in accordance with the relevant procedure of articles 663 et seq of Code of Civil Procedure as a dispute arising from a contract of depended labour/work (see also section 82 of Code of Private Maritime Law) since the Greek Courts have jurisdiction to try same in accordance with the combined provisions of articles 3 par. 1 and 33 of the Code of Civil Procedure, and this Court is

also competent as to the subject matter in accordance with article 16 par. 2 Code of Civil Procedure. Therefore this matter must be further considered from its legal and substantial foundation in view of the fact that in the present case there is no case of lis pendens.

More particularly, in order to justify the above adjudication of the Court concerning lis pendens, which in substance constitutes a negative procedural precondition for a new case (see Bey Civil Procedure section 222 page 998, end) and is examined ipso jure, the following must be emphasized: under the provisions of the relevant article 221 and 222 par. 1 of Code of Civil Procedure, after the commencement of an action and the coming about of lis pendens therefrom, and during it no new case can be brought before any Court for the same dispute between the same litigants if they are appearing in the same capacity. By this prohibition, which seeks the avoidance of the issue of contradictory judgments and the burdening of the Courts with parallel actions in court for the same matter, as well as the avoidance of burdening the litigants with unnecessary expenditures, it is not possible to proceed with a case which has been COMPETENTLY before it, by action, cross-action, main intervention/joinder or objection of set-off, between the same litigants, if it is already pending in another Court. The law makes no distinction if lis pendens occurs at the outset of the case between the same litigants before a foreign court. However there is no such law, in the above instance, since under the applicable Greek Law, the dispute which has been admitted in the foreign Court is subject to the exclusive jurisdiction of the Greek Courts (see Athen's Court of Appeal 3394/1984, ED 25,1205 as well as L. Sinaniotis "the recognition in Greece of lis pendens in foreign Courts page 592). Furthermore, under article 26 of the Civil Code, obligations from tort are governed by the Law of the State where the tort was committed, and under article 5 par. 2 of Penal Code ". . . as territory of the State are considered Greek ships or planes, whereever they may be, unless they are subject to foreign law under the International Law." In the present case, as setout above, the labour accident mentioned therein occured

on board the Greek vessel "CONSTELLATION ENTERPRISE," a fact which is proven by the sworn, before the Court, deposition of the plaintiffs' witness, in conjunction with all the documents which have been lawfully produced and relied upon and the contentions of the plaintiffs. Particularly the nationality of the vessel appears from the contract of employment dated 21.12.1983 between the defendant and the Shipowning Company first plaintiff who is lawfully represented in Greece. It is mentioned there that the vessel flies the Greek flag and is registered in the Piraeus Ships Registry. Accordingly and since the above provisions of article 26 of the Civil Code apply also in respect of quasi-tort, which includes Law 551/1914 concerning labour accidents (which does not require subjective responsibility), Greek Law applies since, as mentioned above, the vessel on board which a labour accident occurred is considered to be the territory of the Greek State (see Public International Law by I. Spyropoulos par. 14). This law is also applicable, from a different angle, under article 25 par. 1 Civil Code as the law to which the parties had expressly subjected themselves (see express note in the above contract of employment, towards end of it) in the employment contract between the litigants, under which the labour accident occured. Consequently in the present case there is no question of lis pendens since in accordance with the Greek Law applied above, the American Courts have no international jurisdiction to try the dispute under consideration. This is so because there exists no jurisdiction as to locality of any form (general or special) taking into consideration that on one hand the accident, as setout above, took place on territory of the Greek State and on the other hand the litigants (plaintiff and defendant) are not residents of U.S.A. (see article 3 par. 1 in conjunction with articles 33, 35 Code of Civil Procedure, see also Em Benterbacher Gerousis in Nob 22 pag. 168 et seq). Furthermore it must be stated that the negative declaratory action is the opposite view of the positive declaratory action, in the sense that the roles of the plaintiff and defendant have been reversed. For this, the one litigant who would have the legal standing to be sued if a positive action had been commenced, has the legal standing to file a

negative action. Corresponding reversal applies also as regards the standing of defendant in the filing of a negative declaratory action. Furthermore the burden of proof of the facts which gave rise to the relevant legal relationship lies on the defendant in a negative declaratory action. Consequently the legal interest of the plaintiff exists when the defendant can pursue, on the basis of his alleged legal relationship, a certain claim (see Bey Civil Procedure article 70 page 288-289, L. Dasios Labour Law of Procedure ed. 1986, volume A/1 page 132 and 750, G. Mitsopoulos Declaratory Action page 174, Supreme Court Judgment 583/1971 Nob. 20, 39 Athen's Court of Appeal 255/1973 Nob 23, 933, Patras Court of Appeal 97/1970 Arch. N. 22, 732). In addition to the above, under article 16 of Law 551/1915, the validity of which was maintained even after the introduction of the Civil Code (article 38 of Introductory Law of Civil Code) and which also applies to seaman (article 2 above Law 551/1916 and section 66 par. B Code of Private Maritime Law) those who have sustained an accident of article 1 of the same law, which can be attributed to dolus (mal intent) of the employer or of his servant, have the elective right of raising a claim for compensation/damages arising either from the above law or from the provisions of the Common Civil Law. The exercise of the elective right of claiming compensation under Law 551/1915 or of a similar claim under the Common Civil Law is of importance because the beneficiary in the first case is not compelled to allege and prove the culpability of the employer or of his servant and the compensation is fixed in accordance with his disability for work, and in the second case it is necessary to allege and prove the dolus of the employer or of his servant or that special negligence exists as regards the observance of the provisions of laws, decrees or regulations relating to conditions of safety of employees, as well as the extent of the damage (see Piraeus Justice of the Peace Court 330/1984 END 12, 381 Athen's Court of Appeal 3770/1983 Nov. 32,301, D. Papadimitriou Labour Law Ed. 1979 page 322, L. Dasios supra par 99). In the premises it is clear that the existence of an internal causative relation between the injured person and his employers or their servants, in

the sense that the damaging action could not exist without dolus or the special negligence as above, is decisive for attributing to them their liability arising from the common civil code, in accordance with what has been stated above. Therefore they have the ability to ask for the recognition/declaration of the non-existence of such legal relationship and consequently of liability on their part. In the present case from the same points of evidence mentioned above the following have emerged: that the defendant, by contract of seaman's work of an indefinite period, executed at Piraeus on 21.12.1983 between him and the lawful representative in Greece of the First plaintiff, a foreign shipping company, was engaged and signed-on on board the cargo vessel "CONSTELLATION ENTERPRISE," which flies the Greek flag GRT 5538 or NRT 2524, as a second mate. The first plaintiff is the Owner of this vessel and the second plaintiff is the manager as well as the general agent of the vessel in Greece. The defendant served on her up to 24 March 1984, when and whilst the vessel was in the Port of New York, sustained injury to his left-hand and was admitted into a local hospital for treatment. His injury occurred under the following conditions: on the morning of 24.3.1984 and around 11.40 hours the defendant was executing the supervision of the handling of shifting, by mechanical winch, of vehicles in the second-deck and was giving instructions and orders by walkie talkie for the handling of the winch to the winch operator Chief-Officer P. Chanialidis, who was in a lower level. At that moment he improperly placed his left hand on the wire-rope of the pulley as it was moving downwards. His hand was caught and the movement of the winch was stopped by the Chief-Officer. The defendant however immediately after instead of giving the order "heave" so that his hand could be disentangled with the movement of the wire-rope of the pulley upwards, he shouted, in his confusion, "lower," i.e. the opposite order as a result the Chief-Officer to operate the winch with a movement of the wire-rope downwards. In this manner four fingers of the left-hand of the defendant were cut-off (see in respect of all this deposition of examined witness and the abstract pages of the deck-log produced in photocopy). The defendant immediately

after the rendering of first aid was admitted, as mentioned above, in a hospital of New York for treatment but the reconnecting of the fingers did not prove possible because they had been crushed (see above deck-log). However in accordance with the facts setout it is clear that the accident occurred not due to dolus or as a result of special negligence of the plaintiffs or of their servants in connection with the observance of the provisions of law, decrees or regulations relating to the safety of employees but from the own fault of the injured second mate.

In the premises the action under consideration, which is founded on all the provisions mentioned above as well as on the relative Collective Agreements of Employment and sections 53 et seq Code of private Maritime Law, 1 of Law 762/78, CL 89/1967, 378/68 and Law 814/78 in force as amended and 648 et seq Civil Code, must be accepted also from the view of its substantive validity and to be recognized/declared that there exists no legal relationship between the plaintiffs in their capacities as setout in the action and the defendant and no liability for compensation/damages under the Common Civil Law from the labour accident which occurred to him, as setout in the order. Each party must pay his costs in accordance with section 179 Code of Civil Procedure. Finally, the deposit for an application for recission of the default judgment must be fixed in respect of invalid service only (article 673, 505 par. 2 Code of Civil Procedure), which is prepayable.

WHEREFORE

It tries the matter in default of the defendant.

It fixes, for the event of the filing of an application for recission of this default judgment, the sum of Drachmae 10,000, only for invalid service.

It accepts the action.

It declares/acknowledges that there is no liability of the plaintiffs, in their capacities setout in the action, for payment by them to the defendant damages under the common Civil

Code in any sum whatsoever and specifically U.S. $10,000,000 as a result of the labour accident which occurred to him (defendant).

And it orders that each party pays his own costs.

Adjudged, decided and published in Piraeus on 18th June, 1986 in a special public hearing at the Court premises of this Court in the absence of the litigants and their lawyers.

THE JUDGE
(SGD)
CONST. PEIOGLOU

THE CLERK OF THE COURT
(SGD)
KALLIOPI STAMATINOU

No. 86-1360

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSTELLATION LINES, S.A. and
ENTERMAR SHIPPING CO. S.A.,

Petitioners,

—against—

GEORGE KARVELIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

THEODORE H. FRIEDMAN
Counsel for Respondent
325 Broadway
New York, New York 10007
(212) 619-1690

JETHRO M. EISENSTEIN
FRIEDMAN & EISENSTEIN
325 Broadway
New York, New York 10007
Of Counsel

15pp

TABLE OF CONTENTS

Table of Authorities

Cases: PAGE

No. 86-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSTELLATION LINES, S.A. and
ENTERMAR SHIPPING CO. S.A.,

Petitioners,

—against—

GEORGE KARVELIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

On March 24, 1984, respondent George Karvelis lost four fingers in an accident aboard the vessel Constellation Enterprise, which was then tied up undergoing repairs in the Port of Newark, New Jersey (15a).*

Karvelis required extensive surgery at Bellevue Hospital in New York, where he was hospitalized for months. While still hospitalized in New York, Karvelis commenced

---

* References in parentheses are to the Appendix annexed to the Petition.

suit against petitioners, his employer and the owner of the vessel, to recover damages for his injury under the Jones Act and the General Maritime Law.

The Constellation Enterprise sailed under the flag of Constellation Lines. In addition to the Enterprise, Constellation Lines consisted of several ships, all of which were engaged in the Atlantic Ports to Mediterranean trade. Each of the ships made regularly scheduled stops along the East Coast of the United States (20a). The voyages of the Enterprise and the other Constellation Lines vessels were advertised weekly in the Journal of Commerce, a domestic periodical (18a).

All nine of the voyages of the Enterprise preceding the incident in which Karvelis was injured either originated in the United States or terminated here. Of the time spent in port by the Enterprise, the period spent in the United States was at least three times the amount that the vessel spent in the port of any other country, including Greece, the country in which the vessel was registered (18a-19a).

The earnings of the Enterprise were derived from cargo which originated in the United States and from cargo which came from the Mediterranean to the United States. American cargo, loaded aboard the Enterprise in the United States, earned annually approximately $7 to $8.5 million in freight charges, while cargo from the Mediterranean to the United States accounted for only $1.5 to $2.5 million of such revenue. The other vessels of Constellation Lines, which had itineraries similar to that of the Enterprise, earned revenues from American and foreign freight in like proportions (19a).

Virtually the entire running of the Enterprise and the other vessels of Constellation Lines had been delegated

by petitioners to Constellation Navigation, Inc. ("Navigation"), an American agent, whose principal office was located in New York City.

At its office in New York City, Navigation had 35-40 employees. Sub-agents and booking offices were also maintained by Navigation in Charleston, Richmond, Baltimore, Chicago, Norfolk, Philadelphia, Cleveland, New Orleans, Boston, Houston and other American ports.

An agency agreement between petitioners and Navigation, equivalent to a general power of attorney, gave Navigation complete authority over the details of the running of Constellation Lines' vessels. By virtue of this authority, the Enterprise and the other ships were operated from the United States by Navigation.[1]

Navigation maintained "multi-million" dollar accounts in two New York City banks, in which it deposited the freight revenues earned by the Enterprise and Constellation Lines' other vessels. From those bank accounts, Navigation paid the expenses of the Enterprise and the other vessels of Constellation Lines (18a).[2]

Navigation also arranged for the berthing of the vessels, traffic matters, fuel and stevedoring, insurance as well as the processing of cargo and personal injury claims.

---

[1] The right to use the name "Constellation Lines" had been granted to petitioner Constellation Lines, S.A. by Navigation. In other words, Navigation, the American entity, owned the trade name under which the vessels operated (19a).

[2] A "Disbursement Account" which recorded the expenses paid from New York City by Navigation with respect to the Enterprise showed transactions over $240,000 for one month. Among the expenses paid for by Navigation was the cost of Constellation Lines' advertising in the Journal of Commerce.

All of the foregoing was done by Navigation and its sub-agents in the United States without any supervision or control from petitioners' Piraeus office (18a).[3]

In addition, the petitioners' owners and directors were shown to have extensive business interests in the United States, which involved them in the operation and servicing in this country of the Enterprise and the other vessels of Constellation Lines.

Through a corporate "nominee", petitioners' principals owned 50% of the shares of Trident Shipping Agency, Inc., a sub-agent of Navigation in Charleston, South Carolina. Trident performed ship agency services for the Enterprise and the other ships of Constellation Lines.

Through a similar corporate nominee, petitioners' principals also owned 50% of the shares of Wando Stevedoring Co., Inc., which performed stevedoring services in Charleston for the vessels of Constellation Lines, including the Enterprise (20a).

Petitioners moved to dismiss for lack of jurisdiction and on grounds of *forum non conveniens*. On the facts set forth above, the District Court found that the Enterprise was managed from New York "to a significant extent" (18a), without "the direction, supervision or control of the owners and charterers in Greece" (18a). Concluding that United States law, including the Jones Act, 46 U.S.C. §688, should apply, the District Court denied petitioners' motion.

On April 30, 1986, after a four day jury trial, the District Court entered a judgment in favor of respondent in

---

[3] Significantly, the agency agreement between petitioners and Navigation also provided that any disputes would be resolved by the parties in the United States in accordance with the laws of the State of New York.

the amount of $300,000 (26a). The District Court judgment was appealed to the United States Court of Appeals for the Second Circuit which affirmed, adopting the opinions of the District Court (1a).

Petitioners have appended to their petition (pages 28a-35a) what purports to be a translation of a decision rendered on June 18, 1986, in a "negative declaratory action", in the Single-Member Court of First Instance of Piraeus, Greece. The document was not proferred in, and is not a part of the record of the proceedings below.

The document recites that proceedings in Greece were had on May 12, 1986 in the absence of respondent (28a). Respondent was said to be "of unknown abode" (29a), even though petitioners' counsel had been with respondent in the District Court in New York not two weeks earlier.

Reasons for Denying the Writ

1. The Greek judgment appended to the Petition is not a part of the record below and was obtained through apparent misrepresentation.

Petitioners suggest as a reason for granting the writ that a judgment in Greece in a "negative declaratory action" is in conflict with the judgment rendered and affirmed by the Courts below. For this reason, the petitioners urge that this Court must re-evaluate the conflict of law analysis applicable to Jones Act cases, in order to protect U.S. judgments.

In order to create a basis for this argument, petitioners have unilaterally placed before this Court what purports to be a translation of the judgment of the Greek court. Although the document recites that the trial proceedings had occurred on May 12, 1986, within two weeks after a

trial of this case in the District Court, and that a judgment was rendered on June 18, 1986, well before petitioners' appeal to the United States Court of Appeals for the Second Circuit was perfected, petitioners never even served this document on respondent, let alone presented it to the courts below as a basis for relief. The document forms no part of the record in the court below, and for that reason alone, ought simply to be ignored.

The document further reveals that despite day to day contact with respondent in the District Court in New York, petitioners represented to the Greek court that respondent was "of unknown abode", and were thereby permitted to proceed *ex parte*. Unfettered by an adversary, petitioners did not advise the Greek court that the United States action was the first commenced, did not advise the Greek court of the bases on which the United States Courts had asserted jurisdiction, and did not advise the Greek court that at the time the matter came on for hearing in Greece, a judgment had already been entered in the United States District Court.

What the Greek court, armed with this information, would have done, respondent cannot say. The fact is, however, that the Greek judgment on its face shows that petitioners substantially and materially misrepresented the basis and status of the United States action, and thereby obtained judgment in Greece. In this Court, petitioners invoke the conflict they created through misrepresentation. Such conduct, we suggest, should not be countenanced. Substantively, the conduct vitiates the Greek judgment as a basis of conflict warranting this Court's review.

2. This case does not implicate the question of due process limitations on the assertion of Jones Act jurisdiction.

Petitioners next suggest that review of this case is appropriate because the assertion of Jones Act jurisdiction over the nominally foreign shipowner implicates constitutional, due process limitations on the assertion of jurisdiction. While such issues, properly presented, may be appropriate for this Court's consideration, this is not the case for such review. The facts found by the District Court and affirmed by the Court of Appeals showed that petitioners had a substantial presence in the United States, including ownership interests; that their vessel was controlled and managed from New York; and that it functioned for all intents and purposes as a United States business. On these facts, "the question of due process limitations in foreign seamen cases" (petition at 7) is hardly implicated. Compare *DeMateos* v. *Texaco Inc.*, 562 F.2d 895 (3rd Cir. 1977), cert. den. 435 U.S. 904 (1978), in which the vessel involved earned no income from voyages to the United States and had its base of operation in Panama and London. 562 F.2d at 902.

3. Jurisdiction was appropriately asserted here, under settled principles which have consistently been applied.

Contrary to the petitioners' suggestion, the lower courts are not in "disarray" over the application of the tests set forth by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970). What petitioners seek to portray as disarray is in fact the different results which flow from the application of those principles to different facts.

Petitioners' effort to demonstrate the proliferation of "factors" considered (Petition at 8) merely shows that courts have engaged in the close factual analysis inherent

in the application of a standard requiring "a cold objective look at the actual operational contacts that this ship and this owner have with the United States." *Hellenic Lines* v. *Rhoditis,* 398 U.S. 306, 310 (1970).

Analysis of the factors which go to assessment of "the real nature of the operation" (id.) may be "exhaustive and complex", but it is hardly inconclusive. It is only through such a process that the real nature of the operation can be revealed.

Stripped to its essence, petitioners' complaint about the need for pre-trial discovery (petition 8-9) is a suggestion that the facade which the shipowner erects with respect to its vessel should control. Such a suggestion is contrary to the teaching of this Court. *Hellenic Lines* v. *Rhoditis,* supra, 398 U.S. at 310.

In their effort to generate reasons for review by this Court, petitioners characterize the decisions of the Courts of Appeal as being in conflict. The examples given of such conflict defeat themselves. *Moncada* v. *Lemuria Shipping Corp.,* 491 F.2d 470 (2d Cir.) cert. den. 417 U.S. 947 (1974) is said to be in conflict with *Phillips* v. *Amoco Trinidad Oil Co.,* 632 F.2d 82 (9th Cir. 1980), cert. den. 451 U.S. 920 (1981). Yet examination of the opinion of the Ninth Circuit in *Phillips* shows that court's view that different rules are appropriate for conventional vessels and stationery drilling rigs, 632 F.2d at 86, and reveals reliance by the *Phillips* Court on *Moncada* as authority for the proposition that different factors have different weight in different settings. 632 F.2d at 85. The same, separate rule for stationery drilling rigs dictated the result in *Vaz Borralho* v. *Keydril Co.,* 696 F.2d 379, 389 (5th Cir. 1983).

Similarly, petitioners posit a conflict, irrelevant to this case, between the Third Circuit and the Second Circuit over the sufficiency of U.S. beneficial ownership alone for application of U.S. law. See petition at 9, n. 3; *DeMateos* v. *Texaco Inc.*, 562 F.2d 895, 902 n. 3 (3rd Cir. 1977), cert. den. 435 U.S. 904 (1978). Notwithstanding the referenced conflict in conceptual views, it is more than probable that the Second Circuit would have denied Jones Act jurisdiction on the facts in *DeMateos,* which revealed no income from U.S. voyages and a base of operation in Panama and London. 562 F.2d at 902. See *Koupetoris* v. *Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976) (shipowner's base of operations in Greece; Jones Act jurisdiction denied despite "regular and continuous course of substantial business" in New York. 535 F.2d at 1395).

Finally, petitioners cite (petition pp. 10 and 11) a series of decisions, said to manifest a "frustrating . . . inconsistency of results". Prime among these is *Fisher* v. *Agios Nicolaos V.*, 628 F.2d 308 (5th Cir. 1980), reh. den. 636 F.2d 1107 (5th Cir. 1981). Judge Brown's dissent from denial of rehearing *en banc* shows that his concern was with the factfinding process, not with the principles to be applied. 636 F.2d at 1111. Judge Brown made clear his view that there had been no finding the vessel was managed and controlled from the United States. Id. at 1109. He noted that doing business in the United States is not the equivalent of having a base of operations here, and that the cases relied on involved more substantial contacts than were present in *Fisher,* id. at 1110.

What emerges from Judge Brown's dissent is concern with dilution of the "base of operations" standard, not disagreement with the applicable standard itself. That *Fisher* was wrongly decided on its facts is no argument

in support of granting certiorari in this case, decided, on the present facts, correctly.

Szumlicz v. *Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983), turns on a finding that the shipowner's base of operations was in the United States. In *Szumlicz,* jurisdiction was sustained. By contrast, where the evidence shows a base of operations in a foreign country, jurisdiction is appropriately denied, notwithstanding substantial activities in and revenues from the United States. *Koupetoris* v. *Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976) (base of operations in Greece); *Rodriguez* v. *Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069 (9th Cir.), cert. den. 464 U.S. 820 (1983) (base of operations in Columbia).

Jurisdiction was denied in *Pereira* v. *Utah Transport, Inc.*, 764 F.2d 686 (9th Cir. 1985) cert. dism. 106 S.Ct. 1253 (1986), despite the shipowner's base of operations in San Francisco, because the vessel involved had virtually no contact with the United States. This result is consistent with the injunction to assess the "actual operational contacts that *this ship* and this owner have with the United States." *Hellenic Lines* v. *Rhoditis,* 398 U.S. 306, 310 (1970) (emphasis supplied). See, also, *Phillips* v. *Amoco Trinidad Oil Co.*, 632 F.2d 82, 88 (9th Cir. 1980), cert. den. 451 U.S. 920 (1981) (focus on base of operations of relevant business venture). In *Dalla* v. *Atlas Maritime Co.*, 771 F.2d 1277 (9th Cir. 1985), the base of operations was in the United States and the shipowner's evasiveness led the Court to conclude that there was United States ownership as well. The assertion of jurisdiction appropriately followed.

The cases discussed above show that the location of the shipowner's base of operations has proven to be a work-

able standard. More importantly, it is an appropriate standard, precisely because "an alien [ship]owner, engaged in an extensive business operation in this country, [should not] have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer'." *Hellenic Lines* v. *Rhoditis,* 398 U.S. 306, 310 (1970).

The Courts of Appeal, applying the standards enjoined upon them by this Court, have consistently held that

> "[a]n important consideration for determining the base of operations is the location at which day-to-day operating activities are conducted. Chiazor [v. Transworld Drilling Co.,] 648 F.2d [1015 (5th Cir., 1981)] at 1019. Accord Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82, 88 (9th Cir. 1980), cert. denied, sub nom., Romilly v. Amoco Trinidad Oil Co., 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981); Cruz v. Maritime Co. of Philippines, 549 F.Supp. 285, 288-89 (S.D.N.Y. 1982), aff'd, 702 F.2d 47 (2d Cir. 1983); Pavlou v. Ocean Traders Marine Corp., 211 F.Supp. 320, 325 (S.D.N.Y. 1962)."

Diaz v. *Humboldt,* 722 F.2d 1216, 1218 (5th Cir. 1984). *Accord Szumlicz* v. *Norwegian American Line Inc.,* 698 F.2d 1192, 1196 (11th Cir. 1983). The District Court determined, on an ample record, that petitioners' base of operation for the Constellation Enterprise was in New York City, and that petitioners had other, substantial United States contacts. These findings of fact, and the consequent assertion of Jones Act jurisdiction, were affirmed by the Court of Appeals for the Second Circuit as straightforward applications of the tests laid down by this Court (Petition at 3a). No reason has been shown for review of this judgment, and none exists.

CONCLUSION

Respondent urges this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and to allow its mandate to become effective.

March 25, 1987

Respectfully submitted,

THEODORE H. FRIEDMAN
Counsel for Respondent
325 Broadway
New York, New York 10007
(212) 619-1690

JETHRO M. EISENSTEIN
FRIEDMAN & EISENSTEIN
325 Broadway
New York, New York 10007
Of Counsel